

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
AKBAR AZAD	:	ORDER
	:	DTA NO. 819650
for Revision of a Determination or for Refund of	:	
Sales and Use Taxes under Articles 28 and 29 of the	:	
Tax Law for the Period September 1, 1999 through	:	
May 31, 2001.	:	

Petitioner, Akbar Azad, 3856 Menard Drive, Carrollton, Texas 75010, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1999 through May 31, 2001.

A hearing was scheduled before Administrative Law Judge Catherine M. Bennett at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Albany, New York on Tuesday, June 8, 2004 at 10:00 A.M. Petitioner failed to appear and a default determination was duly issued. Petitioner has made a written request dated August 5, 2004 that the default determination be vacated. On September 7, 2004, the Division of Taxation filed a response in opposition to petitioner's application to vacate the default.

Petitioner, Akbar Azad, appeared on his own behalf. The Division of Taxation ("the Division") appeared by Christopher C. O'Brien, Esq. (Robert A. Maslyn, Esq., of counsel).

Upon a review of the entire case file in this matter as well as the arguments presented for and against the request that the default determination be vacated, Chief Administrative Law Judge Andrew F. Marchese issues the following order.

FINDINGS OF FACT

1. In July 2001, the Division commenced a sales and use tax field audit of A to Z Candy and Grocery, Inc., which was owned by petitioner. The corporation operated a small retail store named A to Z Grocery Store. The Division issued Notice of Determination L-021662585-6, dated October 15, 2002, to petitioner as an officer or responsible person of the corporation, asserting sales and use tax due for the period September 1, 1999 through May 31, 2001.

2. Petitioner filed a request dated November 4, 2002 for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services. The conference was scheduled for May 15, 2003; however, petitioner failed to appear for the conference. On June 13, 2003, a Conciliation Default Order was issued. On September 8, 2003, the Division of Tax Appeals received from petitioner a petition protesting the assessment here at issue. In his petition, petitioner argued that he was not the owner of the store during the period of the audit. It is noted that although the petition listed Hemang Shah, CPA, as petitioner's representative in this matter, Mr. Shah has not participated in any aspect of this proceeding.

3. On January 15, 2004, the Division of Tax Appeals mailed to petitioner, petitioner's representative and the Division of Taxation a Notice to Schedule Hearing and Prehearing Conference asking the parties to agree upon a mutually convenient date for the hearing. A response from the Division of Taxation selected the date of June 8, 2004. No response was received from either petitioner or his representative. On May 3, 2004, the Division of Tax Appeals mailed notices of hearing advising the parties that a hearing was scheduled for the instant matter on June 8, 2004 at 10:00 AM.

4. By letter dated June 4, 2004, petitioner requested an adjournment of the hearing scheduled for June 8, 2004. No reason for the request was stated. By letter dated June 7, 2004,

the Assistant Chief Administrative Law Judge of the Division of Tax Appeals denied the request since good cause for the adjournment had not been shown to exist.

5. On June 8, 2004 at 10:00 A.M., Administrative Law Judge Catherine M. Bennett called the *Matter of Akbar Azad*, involving the petition here at issue. Present was Mr. Maslyn as representative for the Division of Taxation. Petitioner did not appear, and no representative appeared on his behalf. The attorney for the Division of Taxation moved that petitioner be held in default.

6. On July 14, 2004, Administrative Law Judge Bennett issued a determination finding petitioner in default.

7. On August 17, 2004, petitioner filed an application to vacate the June 14, 2004 default determination. In his application, petitioner indicated that he had asked for an adjournment of his hearing due to health problems. He listed his doctor's name and telephone number and indicated that medical records will be presented at the time of the next hearing. Attached to the application was an invoice addressed to Ali Azad for medical tests performed on May 7, 2004. Petitioner did not explain who Ali Azad is or what laboratory tests performed in May had to do with a hearing held in June.

8. With regard to the merits of his case, petitioner asserted that he moved to Texas in October 1999 and sold only nontaxable items until the premises were subleased to a new owner. Petitioner asserted that the "premises had a new owner during most of the said time until the expiration of the lease." Attached to the application to vacate was a copy of the sublease agreement which provided, among other things, that it was effective as of February 1, 2001 (although signed on March 29, 2001). In addition, it provided that the "premises should be

strictly be [sic] used for the sale of candy, groceries, lottery, magazines, music, DVD, legitimate video films, ice cream, pastries, sandwiches [sic] etc.”

9. The Division of Taxation filed a response dated September 7, 2004 arguing that petitioner has shown neither a reasonable excuse for his default nor a meritorious case. Specifically, the Division pointed out that, contrary to petitioner’s assertion, most of the types of inventory listed in the sublease are in fact taxable items. Moreover, also contrary to petitioner’s assertion, by the terms of the sublease, petitioner was in possession of the premises for substantially all of the audit period.

CONCLUSIONS OF LAW

A. As provided in the Rules of Practice and Procedure of the Tax Appeals Tribunal, “In the event a party or the party’s representative does not appear at a scheduled hearing and an adjournment has not been granted, the administrative law judge shall, on his or her own motion or on the motion of the other party, render a default determination against the party failing to appear.” (20 NYCRR 3000.15[b][2].) The rules further provide that: “Upon written application to the supervising administrative law judge, a default determination may be vacated where the party shows an excuse for the default and a meritorious case.” (20 NYCRR 3000.15[b][3].)

B. There is no doubt based upon the record presented in this matter that petitioner did not appear at the scheduled hearing or obtain an adjournment. Therefore, the administrative law judge correctly granted the Division’s motion for default pursuant to 20 NYCRR 3000.15(b)(2) (*see, Matter of Zavalla*, Tax Appeals Tribunal, August 31, 1995; *Matter of Morano’s Jewelers of Fifth Avenue*, Tax Appeals Tribunal, May 4, 1989). Once the default order was issued, it was incumbent upon petitioner to show a valid excuse for not attending the hearing and to show that

he had a meritorious case (20 NYCRR 3000.15[b][3]; *see also, Matter of Zavalla, supra; Matter of Morano's Jewelers of Fifth Avenue, supra*).

C. Petitioner has failed to demonstrate that he had reasonable cause for his failure to appear for his hearing. Petitioner requested an adjournment of his hearing without stating a reason for the request. Petitioner's request for adjournment was properly denied.

Petitioner stated that he was unable to attend the hearing because of some unspecified "medical reason" for the first time in his application to vacate the default. The invoice submitted by petitioner proves nothing. It specifies a different individual and an unrelated time period. Petitioner has not proven that he missed his hearing for any medical reason. He has not even specified what the medical reason is.

Moreover, petitioner has not explained why his representative did not appear at the hearing on his behalf if petitioner was too sick to attend the hearing.

D. Petitioner has also failed to demonstrate that he has a meritorious case. While petitioner asserts that he sold only nontaxable items, he has submitted absolutely no proof which would tend to prove this. In fact, his sublease agreement calls for the sale of candy, DVDs, video films and sandwiches, all of which are clearly taxable.

In addition, petitioner asserts that there was a new owner during most of the time until the expiration of the lease. However, the audit period extends from September 1, 1999 to May 31, 2001, a period of 21 months. By the terms of the sublease agreement, petitioner owned and operated the store for at least 17 of those 21 months. The sublease is unclear on these time periods at best and is hardly proof of a meritorious case for petitioner. Accordingly, I find that petitioner has not established a meritorious case.

E. It is ordered that the August 17, 2004 request to vacate the default determination be, and it is hereby, denied and the Default Determination issued on July 14, 2004 is sustained.

DATED: Troy, New York
October 21, 2004

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE